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No. 85-1370

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

ARKANSAS WRITERS PROJECT, INC.,

Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Appellee.

On Appeal from The Supreme Court of Arkansas

Motion for Leave to File Brief of *Amici Curiae* and Brief of *Amici Curiae* The Miami Herald Publishing Company and The American Newspaper Publishers Association

RICHARD J. OVELMEN
One Herald Plaza
Miami, Florida 33101
(305) 376-2868

EDWARD SOTO
COUNSEL OF RECORD
Southeast Financial Center
Suite 4350
Miami, Florida 33131-2355
(305) 372-3304

LAURA BESVINICK
SHARPSTEIN & SHARPSTEIN, P.A.
3043 Grand Avenue, PH 1
Coconut Grove, Florida 33133
(305) 442-8100

GERALD B. COPE, JR.
GREER, HOMER, COPE & BONNER, P.A.
Southeast Financial Center
Suite 4360
Miami, Florida 33131
(305) 579-0060

Attorneys for *Amici Curiae*

[List of counsel continued on inside cover]

31pp

Of Counsel:

W. Terry Maguire
General Counsel
The American Newspaper
Publishers Association
The Newspaper Center
11600 Sunrise Valley Drive
Reston Virginia 22091
(703) 648-1055

Parker Thomson
Thomson Zeder Bohrer Werth
Adorno & Razook
4900 Southeast Financial Center
Miami, Florida 33131
(305) 350-7200
Attorney for The Miami Herald
Publishing Company

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The Miami Herald Publishing Company, an unincorporated division of Knight-Ridder Inc., and The American Newspaper Publishers Association (the "*amici*") hereby respectfully move for leave to file the attached brief of *amici curiae* in this case. The consent of counsel for the appellant has been obtained. The consent of counsel for the appellee was requested but refused.

The Miami Herald Publishing Company is an unincorporated division of Knight-Ridder Inc. which publishes *The Miami Herald*, a daily newspaper of general circulation throughout the State of Florida. Knight-Ridder Inc. is a nationwide communications company engaging in the publication of magazines, books, and 28 daily newspapers.

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers, with an aggregate

circulation exceeding 90% of the national total for daily and Sunday newspapers.

The *amici* would be adversely affected if the Court upheld the Arkansas statute at issue in this case. The *amici* are particularly concerned about the suggestion made by the Supreme Court of Arkansas that a sales tax of general applicability could be imposed on newspapers.

The appellant in this case argues primarily that the Arkansas statute is unconstitutional because it singles out certain periodicals for taxation and exempts others. The appellant makes no historical argument regarding the relationship between taxation and the First Amendment. In comparison, the brief which the *amici* are requesting permission to file will argue that a sales tax of general applicability imposed on newspapers would violate the First Amendment. The brief of *amici* will focus on the historical background and the intent of the Framers in drafting the First Amendment.

Respectfully submitted,

EDWARD SOTO
COUNSEL OF RECORD
Southeast Financial Center
Suite 4350
Miami, Florida 33131-2355
(305) 372-3304

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RICHARD J. OVELMEN
One Herald Plaza
Miami, Florida 33101
(305) 376-2868

EDWARD SOTO
COUNSEL OF RECORD
Southeast Financial Center
Suite 4350
Miami, Florida 33131-2355
(305) 372-3304

LAURA BESVINICK
SHARPSTEIN & SHARPSTEIN, P.A.
3043 Grand Avenue, PH 1
Coconut Grove, Florida 33133
(305) 442-8100

GERALD B. COPE, JR.
GREER, HOMER, COPE & BONNER, P.A.
Southeast Financial Center
Suite 4360
Miami, Florida 33131
(305) 579-0060

Attorneys for *Amici Curiae*

[List of counsel continued on inside cover]

Of Counsel:

W. TERRY MAGUIRE
GENERAL COUNSEL
THE AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION
The Newspaper Center
11600 Sunrise Valley Drive
Reston, Virginia 22091
(703) 648-1055

PARKER THOMSON
THOMSON ZEDER BOHRER WERTH
ADORNO & RAZOOK
4900 Southeast Financial Center
Miami, Florida 33131
(305) 350-7200
ATTORNEY FOR THE MIAMI HERALD
PUBLISHING COMPANY

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Brief of *Amici Curiae* The Miami Herald Publishing Company and The American Newspaper Publishers Association

The Miami Herald Publishing Company, an unincorporated division of Knight-Ridder Inc. ("The Miami Herald"), and The American Newspaper Publishers Association ("ANPA") respectfully submit this brief as *amici curiae*. The *amici* support Appellant Arkansas Writers Project, Inc. and urge the Court to reverse the decision of the Arkansas Supreme Court.[1]

INTERESTS OF THE AMICI

The Miami Herald Publishing Company is an unincorporated division of Knight-Ridder Inc. which publishes *The Miami Herald*, a daily newspaper of general circulation

[1] The decisions below are reported as *Ragland v. Arkansas Writers Project, Inc.*, 287 Ark. 155, 697 S.W.2d 94, *supplementary opinion on rehearing*, 287 Ark. 155, 698 S.W.2d 802 (1985).

throughout the State of Florida. Knight-Ridder Inc. is a nationwide communications company engaging in the publication of magazines, books, and 28 daily newspapers.

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers, with an aggregate circulation exceeding 90% of the national total for daily and Sunday newspapers.

The *amici* would be adversely affected were the Court to uphold a state statute which imposes a discriminatory tax burden on certain elements of the press, or discriminates in its incidence based on the content of the expression published.

Of special concern to the *amici* is the suggestion by the Supreme Court of Arkansas that a sales tax of general applicability could be imposed on newspapers.[2] The Miami Herald and ANPA have a substantial interest in explaining why sales taxes on newspapers are unconstitutional and why the Framers of the First Amendment viewed them with particular alarm.[3]

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[2] The states have largely avoided attempts to raise tax revenues from newspaper advertising and circulation sales. Only New Mexico and Hawaii currently tax newspaper advertising sales. All-State Sales Tax Reporter (CCH) ¶¶ 7-025.16, 7-025.36. At the time of this Court's opinion in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) only six states provided newspapers no exemption of any kind from their sales taxes. Eight states presently apply their sales taxes without modification to newspapers. All-State Sales Tax Reporter (CCH) ¶ 7-025.

[3] At least in part due to dictum in *Minneapolis Star, supra* at 588 n.9, Florida has enacted "Sunset" legislation which would automatically repeal press-related sales tax exemptions, as well as other sales tax exemptions, unless they are reenacted at the 1987 session of the Florida legislature. Ch. 86-166, Laws of Florida, 1986 Fla. Law Weekly Sess. Law Reporter 822. If this taxation occurs, Florida newspapers would in a single year suffer a devastating increase in their tax burden amounting to millions of dollars.

SUMMARY OF THE ARGUMENT

The Arkansas sales tax is unconstitutional as applied to magazines or periodicals of general interest because it "singles out a few members of the press" for taxation, and no interest "can justify the scheme." *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (opinion of the Court); *id.* at 593-94 (White, J., concurring). That this discriminatory classification is predicated on the magazines' content only renders it the more constitutionally infirm. *See Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972); *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

This Court need do no more than apply these two fundamental constitutional principles to decide this case. The rehearing decision of the Arkansas court, however, invites adjudication of the larger question regarding the constitutionality of a general sales tax as applied to all of the press. This Court has suggested on several occasions, most recently in *Minneapolis Star*, that "nondiscriminatory taxes on the receipts or income of newspapers would be permissible." *Id.* at 588 n.9, 589 n.12.[4] However, the Court has never had this issue before it on the merits in a case which required its resolution, nor has it

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[4] Conceding that it relied on dictum, the Court stated, "[O]ur cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible," 460 U.S. at 588 n.9, *citing Branzburg v. Hayes*, 408 U.S. 665, 683 (1972); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Follett v. McCormick*, 321 U.S. 573, 578 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

The cited cases do not address the issue of a general sales tax on newspapers, nor is the nondiscriminatory nature of a tax controlling. To the contrary, the Court said in *Murdock*, "The fact that the ordinance is 'nondiscriminatory' is immaterial." 319 U.S. at 115. *Murdock* invalidated a flat license tax on the exercise of rights protected by the First Amendment, while suggesting that income or property taxation on the person who engages in First Amendment activity would be proper. *Accord, Follett v. McCormick*, 321 U.S. at 577-78; *see Grosjean v. American Press Co.*, 297 U.S. at 245-50 (First Amendment bars "taxes on knowledge" whether imposed as stamp tax on sale of newspapers, or on advertisements; owners of newspapers not otherwise immune from ordinary forms of taxation). Finally, *Branzburg*, in dictum, said "a newspaper may be subjected to nondiscriminatory forms of general taxation," 408 U.S. at 683, *citing Grosjean* and *Murdock*. Not only did *Branzburg* not address the issue of sales taxation, but *Branzburg's* reliance on *Grosjean* and *Murdock* as authority necessarily carries the qualifications described above.

decided such a case involving a sales tax on newspapers.[5] More to the point, this Court has stated clearly that it would not hesitate to invalidate any tax contrary to the intent of the Framers of the First Amendment "on that ground alone." 460 U.S. at 584 n.6.

In *Minneapolis Star*, the Court invalidated a state use tax which singled out for taxation components used in the production of the state's larger newspapers. Components used in other industries were not subject to the use tax and small newspapers were effectively exempted. The Court held that "[d]ifferential taxation of the press" so burdens First Amendment interests that it is permitted only when "the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585 (footnote omitted). The Court based its holding at least in part on the "substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment." *Id.* at 583 (footnote omitted). While any fair reading of the historical materials supports the Court's conclusion, it does not follow that the Framers were concerned only with, or even primarily with, differential taxation of the press. Likewise, the simple truth that business regulations of general applicability are usually less threatening to First Amendment interests than discriminatory taxes does not mean the Framers believed any or all nondiscriminatory taxes could be levied on the press.

In fact, the historical evidence reveals the Framers intended the First Amendment to bar more than mere discrimination in taxation. It shows the Framers would have found at least equally troubling any application of a general

[5] The Court has on several occasions dismissed appeals from state courts upholding state taxes on the *gross receipts* of businesses which did not exempt authors or newspapers from the tax. *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, *appeal dismissed*, 358 U.S. 39 (1958) (but newspapers exempted); *Tampa Times Co. v. Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947) (but legislatively overruled); *Giragi v. Moore*, 64 P.2d 819 (Ariz.) (on rehearing), *appeal dismissed*, 301 U.S. 670 (1937) (gross receipts tax, not sales). Although such decisions have some precedential weight, they are not of the same force as an opinion of the Court addressing the merits of the question. *Tully v. Griffin, Inc.*, 429 U.S. 68, 74-75 (1976); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). That no such holding was required in deciding the *Minneapolis Star* case is shown *infra* at 6-7 & n.6.

sales tax to newspapers. The state sales tax, as applied to newspapers, is the contemporary analogue of the odious eighteenth-century stamp taxes, or "knowledge taxes." These taxes imposed a duty on newspapers and other goods at the point of retail sale. They were opposed not only because they were intended to suppress expression or because they singled out the press for discrimination. Indeed, the Stamp Act of 1765 did neither; it was a revenue-raising tax of broad applicability. Even the first Stamp Act applied to goods other than newspapers and served revenue-raising, as well as other, purposes. In part, these Acts were opposed simply because they taxed the sale of newspapers to the public. A general sales tax on newspapers is unconstitutional because it, like the Stamp Act taxes, is precisely the type of "knowledge tax" the Framers intended the First Amendment to preclude.

The Framers' opposition to direct taxes on newspaper sales is complex and historically rooted in their deep antipathy toward the English knowledge taxes. Their posture is not reducible to simple abstract principles, but it may in part be attributable to the combination of characteristics unique to such taxes which the Framers believed rendered them too dangerous to trust government to fairly administer.

The Framers feared the Stamp Acts because they directly taxed the exercise of a fundamental right, the dissemination and acquisition of knowledge. The Framers believed that just as government may not tax prayers or speeches, it may not tax the dissemination or acquisition of news. This is, in fact, the central meaning of several of this Court's more venerable First Amendment decisions. *See, e.g., Follett v. McCormick*, 321 U.S. 573 (1944).

The Framers recognized the Stamp Acts were unrelated to the profitability of the newspapers to which they applied. Since the tax had to be paid even when a publisher made no money, the effect on a marginally profitable publication was to put it out of business. This was indeed the effect of the infamous Stamp Acts, and the Framers well knew it. They believed government should not be granted the power to levy such taxes because their consequence was an evil irrespective of their intent.

The Framers also feared stamp taxes on the press because, in the English experience, they often served to place newspapers beyond the means of the poor. Whether they discriminated or not, flat taxes on the acquisition of news kept newspapers out of the hands of the English lower classes. The Framers intended to give the government no such power.

By the time the First Amendment was adopted, no state imposed a tax on the sale of newspapers. Both Massachusetts and New York, the only states to place taxes on newspapers, had repealed them. This Court should adhere to the intent of the Framers of the First Amendment by declaring that the exemption of the press from sales taxation is constitutionally required.

ARGUMENT

I. The Imposition Of Any Sales Tax On The Press Would Be Contrary To The Intent Of The Framers Of The First Amendment

There can be no doubt, and the *amici* express none, that "the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." 460 U.S. at 581 (citations omitted). But it is equally established that when this Court does "have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone." *Id.* at 584 n.6. It is the burden of this brief to show that the Framers of the First Amendment disapproved of the imposition of taxes on newspapers at the point of sale.

That this historical conclusion can be generally harmonized with the Court's prior teachings on the matter, and is certainly not foreclosed by them, can be shown by a careful reading of the relevant cases. This Court has noted "differential taxation of the press would have troubled the Framers of the First Amendment," 460 U.S. at 583 (footnote omitted), but it has never stated that *only* differential taxation would have offended them or that a general tax of any kind applied to the press would have received their approval. And, although the

Court has suggested that a generally applicable tax presents "little cause for concern" because government will not "destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency," 460 U.S. at 585 (citation omitted), it has not held that general taxes are never cause for concern. It is therefore entirely consistent with this Court's historical understanding and holdings that the Framers were vigorously opposed to any taxation of the press at the point of sale, discriminatory or otherwise.[6]

A. The Framers Intended to Preclude Taxation Of The Press Imposed At The Point Of Sale

This Court has observed that "[w]hen the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected." 460 U.S. at 584. The Federalists argued "that such a guarantee was unnecessary because the Constitution granted Congress no power to control the press." *Id.* The Antifederalists responded that without express protection for the press, the "necessary and proper" clause in combination with the taxing power could be used to abridge its freedom in much the way that power had been used in England. 3 J. Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 441-42 (George Mason); J. Main, *The Antifederalists* 154-55 (1961)

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[6] In reaching its decision in *Minneapolis Star* this Court held only that a differential tax on the press must be justified by an overriding state interest and that the Minnesota tax also was invalid because it discriminated against certain members of the press. The case did not involve the constitutionality of any sales tax, and neither of these holdings requires any finding that sales taxes of general applicability need not exempt newspapers. It may be objected that the Court did opine that Minnesota had an available alternative to differential taxation of the press, in that "the State could raise the revenue by taxing businesses generally . . . ." *Id.* at 586 (footnote omitted). But a general tax need not be a sales tax. And the Court found two "fatal flaws" in Minnesota's claim that its use tax was a "substitute" for its sales tax. *Id.* at 587. First, Minnesota offered no explanation of why it imposed the use tax instead of the sales tax and since the tax fell on components and not ultimate sales, it probably was not a substitute for the sales tax. *Id.* at 588. Second, "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation," so the courts could not administer a rule allowing differential taxation of the press even if the burden would be the same or less as that imposed by other taxes on other taxpayers. *Id.* at 589 (footnote omitted).

(quoting "Timoleon" in *N.Y. Journal*, Nov. 1, 1787); Lee, "Letters from the Federal Farmer" IV, in H. Storing (ed.), *The Antifederalist* 59 (1985). As the Court noted in *Minneapolis Star*, "[t]he concerns voiced by the Antifederalists led to the adoption of the Bill of Rights." 460 U.S. at 584 (citation omitted). Because the "framers of the First Amendment were familiar with the English struggle," *Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936), it is necessary to view the Antifederalists' position against the backdrop of the English experience with the infamous Stamp Acts or "knowledge taxes" to understand precisely their "concerns."

1. The Infamous English Stamp Acts Were General Revenue-Raising Measures Which Taxed Newspapers And Other Goods At The Point of Sale

By the end of the seventeenth century, as the popular demand for easily accessible information grew, the English Crown found it propitious to develop more subtle means to retain some control of the press. Public sentiment began to play a greater role in the conduct of governmental affairs, especially as competing factions of power sought public support for their respective positions. Laws which created and supported the licensing system were regarded as ineffective and unworkable and by 1694 were allowed to lapse. F. Siebert, *Freedom of the Press in England, 1476-1776*, 244, 305-06 (1952).

Despite the fact that the value of a free press was acknowledged by prominent government officials at the turn of the century, publications which commented on political affairs were still viewed with suspicion by government regulators. F. Siebert, *supra*, at 305-06. It was in this light that Parliament first considered taxing the press in order to regulate printed matter indirectly. F. Siebert, *supra*, at 306-10; 1 C. D. Collett, *History of the Taxes on Knowledge* 7 (1899). Parliament had just passed its first tax on printed matter (calendars and almanacs) in 1710, and in 1711 a report had circulated suggesting that taxation of "weekly newspapers and pamphlets . . . would probably reduce the circulation of newspapers from 45,000 to not above 30,000." F. Siebert, *supra*, at 309 (footnote omitted). On January 17, 1712, at the request of the

Ecclesiastical Convocation, Queen Anne addressed Parliament and deplored the

> great license . . . taken in publishing false and scandalous Libels such as are a reproach to any government. This Evil seems too strong for the Laws now in force; it is therefore recommended to you to find a Remedy equal to the Mischief.

F. Siebert, *supra*, at 309; C. D. Collett, *supra*, at 8.

But suppression was not the only purpose of the tax. Of at least equal concern to the Crown was the need to raise money to fight the War of the Spanish Succession. Stewart, *John Lennox and The Greenock Newsclout: A Fight Against the Taxes on Knowledge*, 15 Scot. Hist. Rev. 322, 326-27 (1918); J. B. Williams, *History of English Journalism* (1908); F. Siebert, *supra*, at 309. The newspaper stamp duty and the special tax on advertising in England "were a part of ordinary revenue measures; the position of the government was that the press, as a business, should pay its fair share of taxes." J. Gerald, *The British Press Under Government Economic Controls* 6 (1956).

Parliament responded on May 16, 1712 by passing the first general revenue tax which included a tax on newspapers. This enactment (10 Anne, c. 19), known as the Stamp Act of 1712, placed a tax on imported linen; soaps; several kinds of agreements written on vellum, parchment, or paper; and printed papers, pamphlets, and advertisements. The Act earned its name because it required a stamp to be affixed on all documents, including newspapers at the point of sale. C. D. Collett, *supra*, at 8. The law also provided certain "exemptions" or "discounts". For example, there was a one-third "drawback" on soap used in making clothes or serges, since the wool industry had had a long history of favorable treatment by the government. There was also a "drawback" for paper used by the universities at Oxford and Cambridge and in Scotland, as well as for any books printed in Latin, Greek, Oriental, or Northern languages for the "encouragement of learning." C. D. Collett, *supra*, at 8-9. Thus, the early Stamp Act was directly

analogous to the broad contemporary sales tax, even including a disparate array of exemptions.[7]

Whatever the intent of the English stamp tax, its effects were clear. The immediate consequence of the Stamp Act was the demise of several newspapers. F. Siebert, *supra*, at 312. As Sir Richard Steele, editor of the *Spectator* explained the day before the Stamp Tax went into effect: "This is the day on which many eminent authors will publish their last words." C. D. Collett, *supra*, at 12. The tax likewise retarded the establishment of mass-circulation newspapers. *Id.* at 5-6; Stewart, *supra*, at 326.

Parliament passed a second Stamp Tax Act in March 1765. This Act taxed legal documents (including contracts, court pleas, land grants, college diplomas, and liquor licenses), publications and advertisements, and gambling items (dice and playing cards). The stated purpose of the law was to defray "the expense of defending, protecting, and securing" the colonies. This purpose was real. A large public debt had been incurred during the Seven Years War, and the Stamp Act was only one of several measures designed to increase British revenues. C. Miller, *The Supreme Court and the Uses of History* 76 (1969).

2. The American Colonies Vehemently Opposed The Newspaper Tax Included in The Stamp Act of 1765

The Stamp Act of 1765 so outraged the colonists that Parliament repealed it within a year. In passing this Stamp Act, Prime Minister George Grenville had touched "each nerve center in American life at which either economic or intellectual activity was registered." J. Pole, *Foundations of American Independence, 1763-1815* 42 (1973). "No group in America

[7] The contemporary form taken by state sales taxes is of relatively recent vintage; the first modern sales tax law was enacted by West Virginia in 1921, followed by Georgia in 1929. Morgan, *Retail Sales Tax* 3 (1964). Today some 45 states have a sales tax; only Alaska, Delaware, Montana, New Hampshire, and Oregon do not. St. Tax Guide (CCH) ¶ 60-000 at p. 6021 fn. In general, these sales taxes are peppered with exemptions which serve a variety of purposes—from ameliorating the regressive character of the tax to placating special interest groups. C. Oster, *State Retail Sales Taxation* 114 (1957).

was more directly affected than the publishers of the twenty-four newspapers in the mainland colonies." M. Jensen, *The Founding of a Nation* 126 (1968). Benjamin Franklin, who was serving as a colonial agent in London when the Stamp Act was adopted, wrote to America, "I think it will affect the Printers more than anybody . . . as a Sterling Halfpenny Stamp on every Half Sheet of a Newspaper, and Two shillings Sterling on every Advertisement, will go near to knock up one Half of both." Botein, "Printers and the American Revolution," in *The Press and the American Revolution* 11, 23 (B. Bailyn & J. Hench, eds., 1980). Foreign-language publications had to pay twice the normal rates, a severe blow to the German-language press around Philadelphia, leading Henrich Miller, a German-language publisher, to call the Stamp Act "the most unconstitutional law imaginable." Schlesinger, *The Colonial Newspapers and the Stamp Act*, 8 N.E.Q. 66, 70 (1935).

Some newspapers set off their columns with heavy black mourning margins the day before the tax went into effect, while others printed silhouetted skulls and crossed bones to symbolize a dead free press. J. Lofton, *The Press as Guardian of the First Amendment* 2 (1980); M. Jensen, *supra*, at 127. The New Hampshire Gazette represented itself as gasping, "*I must Die*, or submit to that which is *worse* than Death, *be Stamped*, and lose my Freedom." Schlesinger, *supra*, at 74 (emphasis in original). Many publishers defied the law, printing their newspapers on unstamped paper. In New York, Holt's Gazette added to its title the motto, "The United Voice of all His Majesty's *free* and *loyal* Subjects in America—LIBERTY, PROPERTY and *no* STAMPS." *Id.* at 75 (emphasis in original).

"The newspapers played a tremendous role in political life from the Stamp Act onward." M. Jensen, *supra*, at 127. Newspapers reprinted liberally from each other, thus helping to unite the colonies. They appealed to the masses, stirred their emotions and urged them to action. *Id.* at 128. When stamped copies of newspapers from Barbados and Nova Scotia were found in Philadelphia, they were publicly burned. Schlesinger, *supra*, at 79 n.33. Thus the British themselves helped to make the American press an instrument of revolution. J. Lofton, *supra*, at 2; J. Pole, *supra*, at 423.

In 1765, an assembly of delegates from nine of the colonies met as the "Stamp Act Congress" to protest the tax. A formal complaint was issued, entitled "A Declaration of Rights and Grievances," the basic principles of which were later incorporated into the Declaration of Independence. Because of this opposition, the American stamp tax was repealed less than a year after its enactment. Z. Chafee, *Free Speech in the United States* 321 (1967). In 1787, a leading Antifederalist, Samuel Bryan, wrote in the Philadelphia Independent Gazette and Freeman's Journal that "[i]t was not the mere amount of *the duty on stamps,* or *tea* that America opposed. they were considered as signals of approaching despotism, as precedents whereon the superstructure of arbitrary sway was to be reared." 2 H. Storing (ed.), *The Complete Antifederalist* 176-77 (1981) (emphasis in original).

3. The American Colonies So Opposed Taxes on Newspaper Sales That They Repealed All Such Duties By The Time The Bill of Rights Was Enacted

The English were surprised by the colonists' reaction to the Stamp Act of 1765, but the history of precursor taxes in both New York and Massachusetts foreshadowed the reception awaiting the tax. In New York, a tax was imposed on paper in 1756. It met with strong opposition which led to its demise in 1760. L. Levy, *Judgments: Essays on American Constitutional History* 128 (1972). James Parker, printer of the New York *Gazette,* called the tax "like to a killing Frost," and complained in particular that New York's stamp tax disadvantaged him in competition with printers in nearby colonies. Thompson, *Massachusetts and New York Stamp Acts,* 26 Wm. & Mary Q. 257 (1969); Botein, *supra,* at 24.

In Massachusetts, a halfpenny newspaper tax was passed in 1755. As a result of this tax, one newspaper discontinued publication, while another voiced its opposition to the tax by printing articles on the freedom of the press extracted from contemporary London newspapers. C. Duniway, *The Development of Freedom of the Press in Massachusetts* 120 (1906).

By 1780, after the Declaration of Independence, nine of the newly-formed state governments included specific press clauses in their state constitutions. By the time the Constitution was ratified, every state guaranteed the freedom of the press. These clauses were couched in terms similar to the eventual wording of the First Amendment to the Constitution. C. Duniway, *supra,* at 132-36. Nevertheless, in 1785 and 1786, Massachusetts enacted taxes on both newspaper sales and advertisements. Opposition to these measures was explicitly based on the view that the taxes violated the guarantee of the liberty of the press in the Massachusetts constitution:

> A series of articles in the *Massachusetts Centinel* for April and May, 1785, are typical of the feeling against the tax. It was denounced as "the first Stone in the fabrick of Tyranny"; if the principle of such a tax were once admitted, it might be made prohibitory by a venal House of Representatives and thus "end the liberty of the press." It was contrary to the constitution, because it was a stab at the freedom of the press, and "whatever tends in the smallest degree to deprive the people of political information, is inimical to the principles of Republicanism."

C. Duniway, *supra,* at 136 n.2. This is further evidenced by contemporary articles in the *Boston Gazette:*

> The sixteenth article on our Bill of Rights says: "The Liberty of the Press is essential to the security of Freedom in a State: It ought not therefore to be restrained in this commonwealth."
>
> * * *
>
> The duty on advertisements also prevents our publishing that we have lately reprinted an excellent moral Discourse, entitled "the Shortness and Affliction of Human Life illustrated" . . . .

F. Hudson, *Journalism in the United States* 164 (1873).

As a result of this opposition, the taxes on newspapers and advertisements were repealed by 1788. At the time the Bill of Rights was adopted, no state thought it proper to impose a sales tax on newspapers, and none did.

4. The Debates Over The Ratification Of The Constitution Demonstrate The Framers Did Not Intend Government To Levy Sales Taxes On Newspapers

The Constitution originally contained no Bill of Rights and no guarantee of the liberty of the press. At the Constitutional Convention, the Federalists had successfully argued that none was necessary.[8] The immediate public reaction to the proposed Constitution, however, proved them wrong. The greatest single objection to the new Constitution was the lack of any explicit protection for individual rights, and specifically the liberty of the press. J. Main, *supra,* at 255; R. Rutland, *The Birth of the Bill of Rights* 218 (1955); H. Storing, *What the Antifederalists Were For* 64 (1981). The debate between the Antifederalists and the Federalists over the ratification of the Constitution centered on this objection. Antifederalists argued that without an explicit guarantee, the power to tax for the "general welfare" could be perverted and used to restrict the press. *E.g.,* 3 J. Elliot, *supra,* at 441-42 (George Mason); J. Main, *supra,* at 154-55 (quoting "Timoleon" in *N.Y. Journal,* Nov. 1, 1787). They further argued that because the power to tax was not limited, it would extend to everything, including the press, unless a guarantee of press freedom was added. *E.g.,* Lee, "Letters from the Federal Farmer" IV, XVI, in H. Storing (ed.), *The Antifederalist* 49, 85-86; 4 H. Storing (ed.), *The Complete Antifederalist* 206-07 (Thomas Cogswell). The Antifederalists explicitly stated that a Bill of Rights was needed to prevent the government from imposing stamp taxes on newspapers. As one pamphleteer wrote:

> Congress have power to lay all duties of whatever kind, and although they could not *perhaps* directly bar the freedom of the Press, yet they can do it in the exercise of the powers that are expressly decreed to them. Remember

[8] Late in the Convention, Elbridge Gerry and Charles Pinckney moved that a clause be added to the proposed constitution guaranteeing "that the liberty of the Press should be inviolably observed—." 2 M. Farrand (ed.), *The Records of the Federal Convention* 617 (Madison). Roger Sherman responded, "It is unnecessary—The Power of Congress does not extend to the Press," and the motion was voted down 6-5. *Id.* at 618. *See* M. Farrand, *The Framing of the Constitution of the United States* 124 (1913).

> there are such things as *stamp duties* and that these will as effectually abolish the freedom of the press as any express declaration.

3 H. Storing (ed.), *The Complete Antifederalist* 81-82 (emphasis in original). The Federalists argued primarily that no guarantee of the liberty of the press was necessary because nothing in the Constitution gave Congress the power to tax the press. *E.g.,* 2 J. Elliot, *supra,* at 435-36, 453-54 (James Wilson); 3 J. Elliot, *supra,* at 469 (Edmund Randolph); 4 J. Elliot, *supra,* at 208-09 (Richard Spaight).

In the end, the Antifederalists prevailed. The Constitution was ratified, but only on the understanding that a Bill of Rights, including a guarantee of the liberty of the press, would follow immediately. An analysis of the arguments of the prevailing parties—the Antifederalists—is therefore essential to an understanding of the intent of the Framers of the First Amendment. 460 U.S. at 584-85.

The Antifederalists were concerned that the proposed Constitution could be abused by the new federal government and employed against the press. Richard Henry Lee, one of the most widely read and respected of the Antifederalists, wrote in his "Letters From the Federal Farmer" of the danger to the press posed by the taxing power. Lee feared that, in the absence of an explicit constitutional guarantee, Congress could properly consider itself free to employ the taxing power against the press, just as it would against any other industry. And, because of the supremacy clause, state constitutional guarantees would be powerless to bar federal taxation of the press:

> Should the printer say, the freedom of the press was secured by the constitution of the State in which he lived, congress might, and perhaps, with great propriety, answer, that . . . in exercising the powers assigned them, and in making laws to carry them into execution Congress are restrained by nothing beside the federal constitution.

Lee, "Letters From the Federal Farmer" IV, in H. Storing (ed.), *The Antifederalist* 59.

Lee expanded on this argument in Federal Farmer XVI. He initially noted the widespread belief that the freedom of the press "ought not to be restrained by any taxes." Then he warned the press is provided no protection by the fact that the Constitution does not expressly give the Congress the power to tax it. The danger, Lee notes, is that the power to tax is unlimited:

> But, say the advocates, all powers not given are reserved:—true; but the great question is, are not powers given, in the exercise of which this right may be destroyed? .... [T]he question is, what laws will congress have a right to make by the constitution of the union, and particularly touching the press? By art. I, sect. 8, congress will have the power to lay and collect taxes, duties, imposts and excise. *By this congress will clearly have power to lay and collect all kind of taxes whatever*—taxes on houses, lands, polls, industry, merchandize, &c.—taxes on deeds, bonds, and all written instruments—on writs, pleas, and all judicial proceedings, on licenses, naval officers papers. &c. *on newspapers, advertisements, &c.... Printing, like all other businesses, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it.*

Lee, "Letters From the Federal Farmer" XVI, in H. Storing (ed.), *The Antifederalist* 85-86 (emphasis added).

Lee's fear regarding the taxing power and the press was voiced by many Antifederalists. In New York, Melancton Smith explained why the Constitution needed a press clause: "We contend, that by the indefinite powers granted to the gereral government, the liberty of the press may be restricted by duties, &c. and therefore the constitution ought to have stipulated for its freedom." 1 B. Schwartz (ed.), *The Bill of Rights: A Documentary History* 576 (1971).

The Antifederalists did not distinguish between taxes levied specifically on the press for purposes of suppression and general taxation of the press. A constitutional guarantee of the freedom of the press was understood to bar both equally. Thus,

in Federal Farmer IV, Lee notes that, without an explicit guarantee, Congress would be free both to lay "any duties whatever on printing" *and* to lay "duties particularly heavy on certain pieces printed." Likewise in Federal Farmer XVI, Lee explains that left unrestricted the taxing power will reach "newspapers [and] advertisements," just as it does "industry [and] merchandize." In the minds of the Antifederalists, a guarantee of the liberty of the press was essential to stop Congress from laying *any* duties at the point of sale on the press.

The important lesson taught by the history of the Framers' opposition to the stamp taxes is they were deeply offended by any tax on the sale of newspapers to the general public. Even where stamp taxes were enacted for revenue-raising purposes and had a broad applicability, they were anathema to the Framers. An important purpose of the First Amendment was to ban taxation of the press at the point of sale, which necessarily precludes imposition of a general sales tax. It follows that the exemption sought by the Arkansas Writers Project must be granted.

B. The Framers Intended the First Amendment to Bar Any Tax Which Acted as a "Knowledge Tax" Because They Considered The Potential for Abusive Consequences Too Great

The unrelenting antipathy of the Framers toward any tax on knowledge, whether in the form of the Stamp Act of the colonial era or the contemporary sales tax on newspapers, reflects most profoundly the Framers' reading of English and colonial history and the socio-political world of eighteenth century America. The complexity of the Framers' rationale does not lend itself to any reductionist explanation, but several powerful themes run through the Framers' writings on those matters which help in part to explain their view.

First, the Stamp Act, like the sales tax, directly burdened the exercise of a right: the acquisition of news and information. As New Hampshire Chief Justice Thomas Cogswell, wrote:

> The liberty of the Press is essential to a free people, it ought therefore to be inviolably preserved and secured in

> the Bill of Rights, and no duty or tax to be imposed thereon, of what name or nature soever.

4 H. Storing (ed.), *The Complete Antifederalist* 206-07. Similarly Lee, in his "Letters from the Federal Farmer" noted:

> All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever.

Lee, "Letters From the Federal Farmer" XVI, in H. Storing (ed.), *The Antifederalist* 85.

This Court has long recognized the danger of allowing states to tax the exercise of constitutional rights. *Follett v. McCormick*, 321 U.S. at 578 (no requirement "to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege"); *Murdock v. Pennsylvania*, 315 U.S. 105, 113 (1943) ("A state may not impose a charge for the enjoyment of a right granted by the federal constitution.").[9]

Second, the Framers were deeply concerned by the fact that the stamp tax (like the sales taxes) imposed a burden on newspapers unrelated to their profitability. Richard Henry Lee expressed this fear most clearly: "Printing, like all other busi-

[9] In *Minneapolis Star*, the Court suggested in dicta that *Breard v. Alexandria*, 341 U.S. 622 (1951), "substantially undercut" this line of cases which began with *Martin v. Struthers*, 319 U.S. 141 (1943), 460 U.S. at 586 n.9. But neither *Martin* nor *Breard* addressed the question of whether a direct tax may be placed on the exercise of a right since neither involved taxation. The *Beard* decision held only that any First Amendment interest in soliciting periodical subscriptions door-to-door at private homes, in the absence of an invitation from the homeowner, must give way to the privacy rights of the homeowner. That *Breard* did not disturb *Murdock* and *Follett* regarding the rule of law prohibiting direct taxation of rights is evident from the restatement of that position by the Court in the term immediately following the *Breard* decision. *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952).

Whether *Breard* itself remains good law in any respect is open to serious doubt. *Compare Breard with Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 n.7 (1980) ("To the extent that any of the Court's past decisions discussed in Part II [including *Beard*] hold or indicate that commercial speech is excluded from First Amendment protection, those decisions, to that extent, are no longer good law.").

> nesses, must cease when taxed beyond its profits." Lee, "Letters From the Federal Farmer" XVI, in H. Storing (ed.), *The Antifederalist* 85-86 (emphasis added).

The Framers knew that marginally profitable newspapers, whether large or small, often did not survive a tax imposed at the point of sale. They knew this because the English and Massachusetts experience demonstrated it. As Professor Siebert starkly observed: "A sizable number of newspapers were immediately killed by the Act." F. Siebert, *supra*, at 312. Jonathan Swift noted the draconian effect of the Stamp Act on the English "penny press" with typical, yet telling, hyperbole:

> Do you know that all Grub-street is dead and gone last week? . . . [N]ow every single half-sheet pays a halfpenny to the queen. The *Observator* is fallen; the *Medleys* are jumbled together with the *Flying Post;* the *Examiner* is deadly sick; the *Spectator* keeps up and doubles its price.

Id. at 313. Because they knew the potential danger of direct sales taxes to economically weak publications, the Framers greatly feared them. It was no solace to them that a sales tax which applied to a variety of goods would drive marginally profitable non-press companies out of business as effectively as it killed the profitless members of the press.

Third, perhaps the Framers' greatest concern was the effect of a stamp tax on newspaper sales, particularly the less affluent populace. They understood that the English Crown had used such taxes to place acquisition of the news beyond the reach of many members of the public. As noted above, the intent of the first stamp tax was in part to reduce newspaper circulation by one-third. F. Seibert, *supra*, at 308-09. The primary victims of the tax were the inexpensive publications which had formerly circulated widely among the general public:

> Was there no way by which, without the necessity of constant contention, private men might be prevented from using the Press to make their opinions public? The pamphleteers were not rich, but they were often persons of

> education, and not penniless. When only a few copies of their writings were wanted they could pay for them, but now that reading was become more common, and that great numbers of copies were printed, the cost had, to a great extent, to be paid by the readers. If these sheets could be taxed their distribution might become difficult, and when any one attempted to evade the tax he could be punished, not as a libeller, but as a smuggler, and the character of what was printed would not come under discussion, as it generally would in a trial for libel.

C.D. Collett, *supra*, at 7.[10]

Whether these concerns of the Framers retain all of their vitality today is beyond the issue and the record of this case. It is enough that a law imposing taxes on the retail sale of newspapers "would have offended the Framers"; the Court should not "[hesitate] to invalidate it on that ground alone." 460 U.S. at 584 n. 6.

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[10] "Cheapness and expansion were evidently becoming the characteristics of the periodical press; to which every tax, however light, was an impediment. Hence a new movement for the repeal of all 'Taxes on knowledge' led by Mr. Milner Gibson, with admirable ability, address, and persistence. In 1853, the advertisement duty was swept away; and in 1855, the last penny of newspaper stamp was relinquished. Nothing was now left but the duty on paper; and this was assailed with no less vigor. Denounced by penny newspapers, which the repeal of the stamp duty had called into existence; complained of by publishers of cheap books; and deplored by the friends of popular education, it fell, six years later, after a parliamentary contest memorable in history. And now the press was free alike from legal oppression and fiscal impediments." 2 T. May, *Constitutional History of England* 215 (1891).

CONCLUSION

For the reasons stated, the First Amendment precludes imposition of a sales tax on the press. Accordingly, the judgment below should be reversed.

Respectfully submitted,

EDWARD SOTO
COUNSEL OF RECORD
Southeast Financial Center
Suite 4350
Miami, FL 33131-2355
(305) 372-3304

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